

# ROLE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO AND CURRENT ISSUES

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# DISCLAIMER

THIS PRESENTATION IS:

- PROVIDED FOR INFORMATIONAL PURPOSES,
- NOT LEGAL ADVICE, AND
- NOT BINDING ON THE IPC.

# OUTLINE

1. Role of the Information and Privacy Commissioner of Ontario
2. Current issues

# ROLE

# INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO (IPC)

- The IPC is an officer of the legislative assembly
- Until very recently, the IPC only had authority under three acts:
  - *Freedom of Information and Protection of Privacy Act (FIPPA)*
  - *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*
  - *Personal Health Information Protection Act, 2004 (PHIPA)*

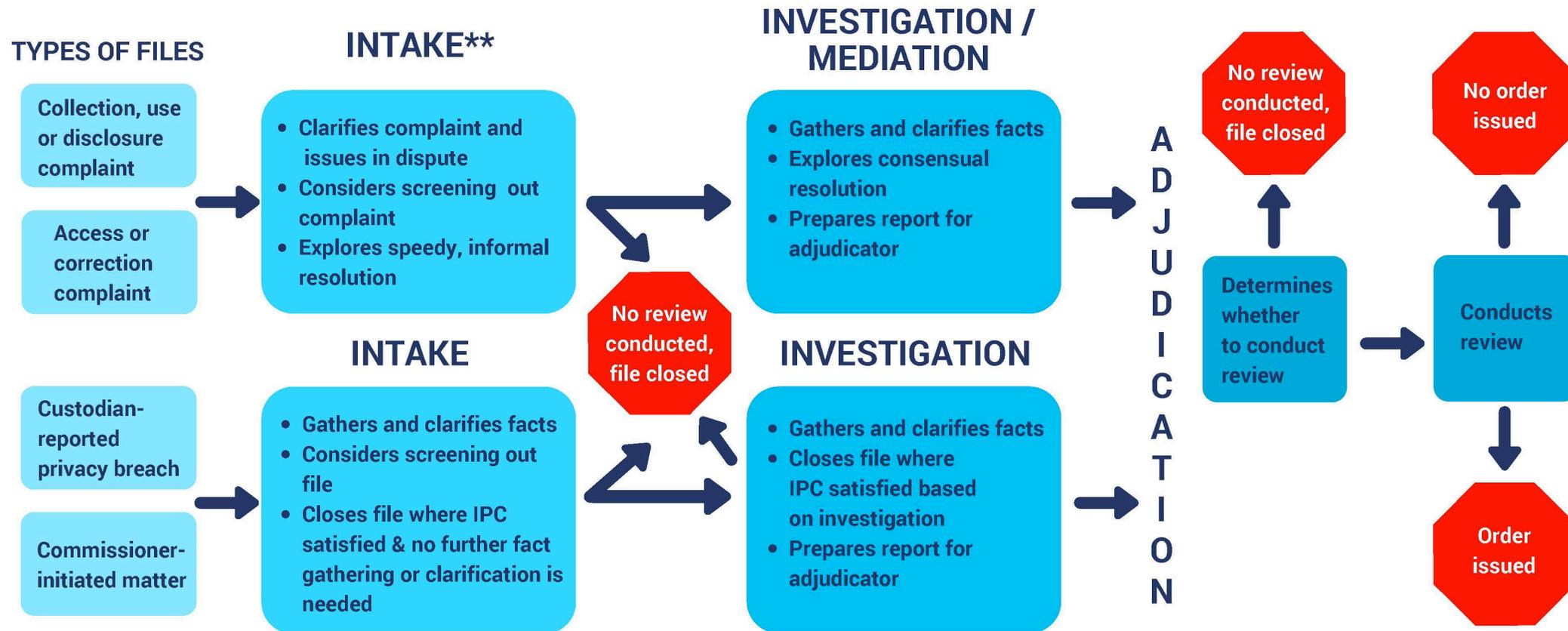
# INFORMATION AND PRIVACY COMMISSIONER (IPC) (CONT'D)

- But now there are more acts with an oversight role for the IPC, including
  - *Child, Youth and Family Services Act, 2017*
  - *Anti-Racism Act, 2017*

# *PHIPA* TRIBUNAL PROCESSES

- The IPC receives and adjudicates complaints regarding compliance with *PHIPA*, receives breach reports from health information custodians, and can commence self-initiated investigations
- The IPC issues “*PHIPA* Decisions” which include:
  - Orders
  - Decisions not to conduct a review
  - Decisions following a review, with no orders
  - Interim decisions

# PHIPA Processes Flowchart



\* The above process may be varied at the discretion of the IPC to achieve the fair, just and timely resolution of proceedings before the Commissioner or his delegates. Note specifically that urgent matters may be expedited to the adjudication stage.

\*\* In addition to the general procedures outlined in the above flowchart, Intake also adjudicates time-sensitive complaints related to deemed refusals, failures to provide access and expedited access requests.

HEALTH

AUGUST 2019

Code of Procedure  
for Matters under the *Personal Health  
Information Protection Act, 2004*



Information and Privacy  
Commissioner of Ontario  
Commissaire à l'information et à la  
protection de la vie privée de l'Ontario

# ***PHIPA* TRIBUNAL PROCESSES (CONT'D)**

- Approximately 160 Decisions issued since changes made to IPC's *PHIPA* processes in August 2015
- More staff involved in *PHIPA* Decisions
  - *PHIPA* Orders previously written primarily by Commissioner or Assistant Commissioner
  - IPC Adjudicators and Investigators to write more decisions (also analysts in some circumstances)

# THREE-YEAR REVIEWS

- Several statutes require organizations that collect personal information/personal health information without consent to have their practices and procedures reviewed and approved by the IPC
- These reviews focus on the practices and procedures put in place to protect the privacy of the individuals whose personal information/personal health information it receives and to maintain the confidentiality of the information
- There is an initial review followed by subsequent reviews every three years
- The IPC has published manuals setting out the process and requirements applicable to these reviews

# THREE-YEAR REVIEWS (CONT'D)

- Under *PHIPA*, such reviews are conducted of:
  - Prescribed entities who receive personal health information for the purpose of health system analysis (e.g. Institute for Clinical Evaluative Sciences)
  - Prescribed persons who compile or maintain a registry of personal health information for purposes of facilitating or improving the provision of health care or that relates to the storage or donation of body parts or bodily substances (e.g. Ontario Health in respect of the Cancer Ontario Cancer Screening Registry)
  - The prescribed organization (i.e. Ontario Health) who develops and maintains the provincial electronic health record under Part V.1 of *PHIPA*

# POLICY AND LEGISLATIVE CONSULTATIONS

- The IPC also engages extensively in policy consultations with the health sector, including with the government, health information custodians, and others
- Some policy consultations are legislated (e.g. requirement to consult with the IPC prior to issuing a directive)
- We routinely comment on draft legislation and regulations

# CURRENT ISSUES

# INTRODUCTION TO *PHIPA* AMENDMENTS

- Since 2019, the Ministry of Health has been seeking to “modernize” *PHIPA*
- This process has resulted in amendments to *PHIPA* in:
  - *Bill 138, Plan to Build Ontario Together Act, 2019*
  - *Bill 188, Economic and Fiscal Update Act, 2020*
- Some amendments are in force and some are not
- This has also resulted in changes and proposed changes to the regulation to *PHIPA*

# INTRODUCTION TO *PHIPA* AMENDMENTS (CONT'D)

- Changes to *PHIPA* and its regulation cover several novel and important privacy and access to information issues, including:
  - Administrative penalties and offences
  - Regulation of de-identified information
  - Access to records in electronic format
  - Requirement to maintain an electronic audit log
  - Interoperability requirements

# ADMINISTRATIVE PENALTIES AND OFFENCES

- Bill 188 amended *PHIPA* to allow the IPC to issue an order requiring a person who has contravened *PHIPA* or its regulation to pay an administrative penalty
- The IPC is the first Canadian privacy commissioner to have this power
- Administrative penalties may be issued to:
  - encourage compliance with *PHIPA* and its regulation; or
  - prevent a person from deriving any economic benefit as a result of a contravention

# ADMINISTRATIVE PENALTIES AND OFFENCES (CONT'D)

- The amount of an administrative penalty will be determined in accordance with regulations yet to be prescribed
  - As these regulations have not yet been prescribed, the IPC cannot issue administrative penalties
- Administrative penalties must be paid to the Ministry of Finance
- Bill 188 also amended *PHIPA* to double fines for offences
- Fines are now up to \$200,000 for individuals and \$1,000,000 for corporations. Individuals can also be imprisoned for up to 1 year. These amendments are in force

# REGULATION OF DE-IDENTIFIED INFORMATION

- There has been increasing concern about the ability of organizations to use large data sets of de-identified health information to re-identify individuals
- In light of these concerns, three amendments were made to *PHIPA*
  1. Bill 138 amended *PHIPA* to prohibit a person from using or attempting to use de-identified information to identify an individual, subject to certain exceptions (in force as of July 31, 2020)
  2. Bill 138 also created an offence for willfully contravening this prohibition on the use of de-identified information to re-identify an individual (in force as of July 31, 2020)
  3. Bill 188 amended the definition of “de-identify” to enable requirements to be prescribed for how personal health information (PHI) is to be de-identified (not yet in force)

# ACCESS TO RECORDS IN ELECTRONIC FORMAT

- With the increase in electronic forms of communication, there was a concern that an individual's right of access under *PHIPA* would become outdated
- Individuals are also increasingly taking steps to manage their own PHI through patient portals and health apps
- In light of these changes, two amendments were made to *PHIPA*
  1. Bill 188 amended *PHIPA* to give individuals the right to access their records of PHI in an electronic format that meets prescribed requirements
  2. Bill 188 also amended *PHIPA* to regulate a new class of persons called "consumer electronic service providers" (CESPs)

# ACCESS TO RECORDS IN ELECTRONIC FORMAT (CONT'D)

- Regarding the right to access records in an electronic format that meets the prescribed requirements, the government posted regulations for comment on October 16, 2021
- The proposed regulations indicate that an individual's right of access includes the right to have the health information custodian provide the record in a PDF file, unless doing so would result in undue hardship to the health information custodian
- The IPC recently made a submission critical of the proposed regulation (particularly in relation to the undue hardship exemption)

# ACCESS TO RECORDS IN ELECTRONIC FORMAT (CONT'D)

- CESTPs are defined as persons who provide electronic services to individuals at their request, primarily for the purpose of allowing those individuals to access, use, disclose, modify, maintain or otherwise manage their records of PHI, or for such other purposes as may be prescribed (e.g. apps used by individuals to access copies of physician reports and prescriptions)
- Many of the specific requirements relating to CESTPs are left to be prescribed in regulation
- The CESTP provisions are not yet in force and no regulations have been made

# ELECTRONIC AUDIT LOGS

- The IPC has held that electronic audit logs must be maintained and monitored by custodians to detect and deter unauthorized access to PHI
- This obligation flows from the requirement in *PHIPA* for custodians to take reasonable steps to protect PHI, for example, against theft, loss and unauthorized use or disclosure
- Bill 188 clarified this obligation by specifically requiring that custodians maintain and monitor an electronic audit log of accesses to PHI, subject to prescribed exceptions, and to provide that log to the IPC upon request
- These provisions are not yet in force and exceptions, if any, have not yet been prescribed

# INTEROPERABILITY REQUIREMENTS

- Increased use of electronic information systems in health care has created another problem: silos of information in one electronic system that cannot be read or understood by other systems
- *PHIPA* was recently amended to allow regulations to be made governing the interoperability between health information custodians' systems. This is not in Part V.1 of *PHIPA*.
- Regulations came into force on January 1, 2021
- Regulations require Ontario Health to set “interoperability specifications” relating to custodian’s “digital health assets”

# INTEROPERABILITY REQUIREMENTS (CONT'D)

- Interoperability specifications may be made at the direction of the Minister of Health and must be approved by the Minister to be effective
- Ontario Health will publish interoperability specifications, develop a certification process, and also publish a list of compliant digital health assets
- Custodians will be required to use digital health assets that comply with the interoperability specifications
- Ontario Health will be responsible for monitoring custodian's compliance with the interoperability specifications and consulting with custodians on compliance issues. Custodians must cooperate with and assist Ontario Health

# INTEROPERABILITY REQUIREMENTS (CONT'D)

- The IPC must be consulted when Ontario Health is developing an interoperability specification that relates to the confidentiality of PHI, the privacy of individuals or the rights of access or correction
- The IPC may receive complaints that custodians have selected digital health assets that do not comply the interoperability specifications, and adjudicate compliance (which could include issuing orders). Ontario Health may make complaints and provide information it gathers to the IPC
- Selecting compliant digital health assets does not relieve custodians of their other obligations. For example, custodians must still comply with the security requirements in *PHIPA*

QUESTIONS?